IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT FOR STATE APPELLANT

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QUESTIONS PRESENTED

In 1995, the State of Texas submitted changes to its Education Code to the Department of Justice (the "DOJ") for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Although the state believed that the sanctions provisions of the Education Code, which provided the Commissioner of Education with the ability to hold deficient school districts accountable, are not changes affecting voting, DOJ disagreed, and precleared Texas Education Code § 39.131(a)(7) and (a)(8) as enabling legislation. Because Texas disagreed with the DOJ's over-expansive interpretation of the scope of § 5, Texas later filed a declaratory judgment suit in federal district court seeking a determination that § 39.131 (a)(7) and 39.131(a)(8) were not subject to § 5 preclearance, because they did not constitute a change affecting voting. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 do not apply to actions taken pursuant to the federal Improving America's School Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"). The district court dismissed Texas' suit on the grounds that Texas' claims were not ripe. The questions presented are:

1. Does a three-judge panel of a district court have jurisdiction over a State's claim, under 42 U.S.C. § 1973c, that an amendment to a state statute is not a change covered by § 5 of the Voting Rights Act, and need not be precleared?

2. Is a state's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has taken no action under the "enabling" legislation?

PARTIES TO THE PROCEEDING

Plaintiff

The State of Texas

Defendant

The United States of America

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JURISDICTIONAL STATEMENT

The State of Texas appeals from the order of the United States District Court for the District of Columbia, dismissing Texas' claims as not ripe for adjudication.

Opinion Below

The unreported opinion of the three-judge district court is set out in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-10a. The court's order is at J.S. App. 11a-12a. The amended opinion of the three-judge district court, which is identical to the original opinion, but contains the signatures of all three participating judges, is set out at J.S. App. 13a-23a. The court's amended order is at 24a-25a.

Jurisdiction

The judgment of the United States District Court for the District of Columbia was entered on March 5, 1997. An

amended judgment, signed by all three judges, was filed on March 17, 1997. The State filed a notice of appeal to this Court on April 23, 1997, J.S. App. 26a-27a, and filed a supplemental notice of appeal on May 12, 1997. J.S. App. 28a-29a. This Court has jurisdiction under 42 U.S.C. § 1973c and 28 U.S.C. § 2101(b).

Constitutional and Statutory Provisions Involved

The relevant federal statutory provisions are: the Voting Rights Act, 42 U.S.C. § 1973c; the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891 (e) ("Ed-Flex"); Goals 2000: Educate America Act, 20 U.S.C. § 5801 *et seq.;* and the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*

The relevant state statutory provisions are Texas Education Code, §§ 39.131(a) and (e). The relevant state and federal statutes are set out at J.S. App. 49a-92a.

Statement of the Case

The State of Texas is a jurisdiction covered by section 5 of the Voting Rights Act ("§ 5"). In this case, Texas sought a declaratory judgment that a change in two of the sanctions provisions contained in its education legislation is not a change affecting voting, and is not subject to the preclearance requirements of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Alternatively, Texas sought a declaratory judgment that the preclearance provisions of § 5 do not apply to provisions of state law that conform with the federal Improving America's School Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891 (e) ("Ed-Flex"). Rather than address the merits of the claim, the three judge panel held that Texas' claim was not ripe where the Attorney General had precleared the legislation as "enabling" legislation, and the State

had taken no action requiring preclearance pursuant to that enabling legislation.

A. Texas' Educational Accountability System

Texas, like all states, has a substantial interest in the education of its children. Texas has made it "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1. Article VII, § 3 of the Texas Constitution provides in part that "the Legislature may also provide for the formation of school district[s] by general laws." Local school districts are governed by an elected board of trustees. TEX. EDUC. CODE § 11.059. In Texas, therefore, both the state and the local school districts are responsible for the public schools.

In 1995, the Texas Legislature enacted Chapter 39 of the Texas Education Code as part of Texas Senate Bill 1 ("S.B. 1"). Chapter 39 is an accountability system that holds local school districts responsible for academic performance levels and for compliance with state laws and effective governance procedures. Section 39.131 authorizes the Commissioner of Education ("Commissioner") to impose sanctions on a school district if it fails to satisfy the accreditation criteria specified in section 39.072. These sanctions allow the State to ensure that school districts adequately perform their duties in educating the State's children.

Section 39.131(a) provides ten sanctions the Commissioner may impose on a school district when necessary. The sanctions increase in severity. Two of the possible sanctions contained in § 39.131(a) form the core of this case. Section 39.131(a)(7) allows the Commissioner to appoint a master to oversee a school district's operations. Section 39.131(a)(8) authorizes the Commissioner to appoint a management team to direct the operations of a school district in areas of unacceptable performance or require a school

district to obtain certain services under contract with another person. The appointment of a master or management team for a short period of time as provided by § 39.131(a)(7) and (8) gives the Commissioner the necessary tools with which to deal with serious problems that threaten the educational process in a district.

B. Texas law makes clear that the authority of a master or management team is limited and the placement of a master or management team is temporary

Texas law limits the authority of the master or management team. A master or management team may: (1) direct an action to be taken by the principal of a campus, the district superintendent, or the district's board of trustees; and (2) approve or disapprove any action of the campus principal, the district superintendent, or the district's board of trustees. TEX. EDUC. CODE § 39.131(e)(1), (2). State law, however, specifically prohibits a master or management team from taking any action concerning a district election, including ordering or canceling an election or altering the date of, or the polling places for, an election; changing the number, or method, of selecting the board of trustees; setting a tax rate for the district; and adopting a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees. TEX. EDUC. CODE § 39.131(e)(3)-(6).[1]

The elected board of trustees is not displaced during the time the master or management team is in place. School boards

[1] The Texas Legislature imposed these prohibitions to ensure specifically that the sanctions in § 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, would not implicate the Voting Rights Act. *See* letter from Antonio O. Garza, Texas Secretary of State, to DOJ (June 12, 1995), J.S. App. 32a-33a.

continue to have all the authority with which they are vested by Chapter 11 of the Education Code, subject to oversight by the master or management teams as needed to ensure that the deficiencies which made their appointment necessary are cured. The local school board continues to meet and make decisions. Moreover, the placement of a master or management team is temporary. Under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the master or management team must be removed. *Id.* Finally, a party that disagrees with the Commissioner's actions, including a change in a district's accreditation status or the imposition of sanctions on a district, has a right to appeal his action to the district court of Travis County, Texas. TEX. EDUC. CODE § 7.057(d). The temporary nature of the placement, and the limitations on the authority of the master or management team, ensure that no de facto replacement of the elected board takes place.

C. DOJ preclears § 39.131(a)(7) and 39.131(a)(8) as enabling legislation

On June 12, 1995, Texas submitted S.B.1 to the United States Department of Justice ("DOJ") for administrative preclearance under section 5 of the Voting Rights Act. In doing so, Texas specifically noted that it did not believe that the sanctions provisions of § 39.131(a)(1)-(10) needed to be precleared under § 5, because they did not constitute voting-related changes. *See* letter from Antonio O. Garza, Texas Secretary of State, to DOJ (June 12, 1995), J.S. App. 31a-34a; letter from Antonio O. Garza, Texas Secretary of State, to DOJ (Oct. 9, 1995), J.S. App. 93a-102a.

The Attorney General agreed with Texas that most of the sanctions permitted under Chapter 39 are not voting changes subject to preclearance under § 5 of the Voting Rights

Act. The Attorney General, however, determined that placing a master or management team could be a change affecting voting and precleared those sanctions only as enabling legislation. The Attorney General concluded that Texas must obtain preclearance in each instance that it places a master or a management team to oversee the operations of a school district pursuant to § 39.131(a)(7) and (8), "because S.B. 1 still potentially allows for the 'take-over' of a school board such that the board cannot perform the functions that are its 'reason for being.'" *See* Letter from DOJ to Antonio O. Garza, Texas Secretary of State (December 11, 1995), J.S. App. 37a.

D. Texas is an Ed-Flex Partnership State

In January 1996, Texas was selected as one of seven Ed-Flex Partnership states, pursuant to the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5891 *et seq*. *See* Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996), J.S. App. 39a-48a. Ed-Flex provides that the Secretary of Education may authorize State educational agencies in eligible States to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2), 20 U.S.C. § 5891 (e)(4)(B)(ii). One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes corrective actions that a State must take against a school district that fails to make adequate progress towards meeting the State's student performance standards. 20 U.S.C. § 6317 (d)(6)(A).

Because Texas is designated as an Ed-Flex partner, it may waive federal education regulations and statutory requirements, and replace them with its own regulations. 20 U.S.C. § 5891(e)(4)(B)(ii). As an Ed-Flex Partnership State, Texas substituted its accountability provisions, including the

sanctions listed in § 39.131(a), for the provisions of federal law. 20 U.S.C. § 5891(b)(1). In other words, § 39.131(a)(7) and (a)(8) are sanctioned by Congress' federal education laws.

E. The filing of the lawsuit in the court below

On June 7, 1996, Texas filed its complaint under the Voting Rights Act, 42 U.S.C. § 1973c, seeking a declaratory judgment that the temporary placement of a master or a management team under § 39.131(a)(7) and (8) of the Texas Education Code is not a change affecting voting, and, therefore, must not be precleared. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act do not apply to actions taken pursuant to the federal Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex").

Texas requested a three judge panel pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c. The district court accepted jurisdiction on July 15, 1996, and appointed a three-judge panel on July 22, 1996. Texas then moved for summary judgment. The United States filed a motion to dismiss. After briefing by the parties, the three-judge panel granted the United States' motion to dismiss on March 5, 1997, on the grounds that the case was not ripe for judicial review. J.S. App. 10a. The court filed an amended order on March 17, 1997, signed by all three judges.[2]

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[2] Except for the signatures of all three judges, the amended order is identical to the original order, and the amended memorandum opinion is identical to the original memorandum opinion. Cites to the Appendix are to the amended memorandum opinion.

F. The lower court's decision

The district court's opinion is contradictory. The district court correctly recognized that "Texas is not seeking preclearance of its legislation," J.S. App. 16a, but "[r]ather, ... seeks a blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." J.S. App. 16a-17a. The court noted, however, "that Texas has presented a claim that does not fit neatly into the statutory framework of section 5," J.S. App. 16a, and opined that "[t]he statutory basis for jurisdiction over such an action is unclear." J.S. App. 17a. The district court, however, did not decide whether the court had jurisdiction over Texas' claim that the statute need not be precleared under § 5, deciding instead that the case was not ripe for judicial review. J.S. App. 17a.

The district court concluded that Texas' claims met neither the constitutional nor the prudential components of the ripeness doctrine. J.S. App. 17a. In holding that Texas' claim was not ripe, the court rejected Texas' argument that the case presented a legal issue regarding the interpretation of a state statute. Instead, the court held that factual development of the "actual contours" of each appointment order was needed to determine whether an elected board was displaced or its powers diminished. J.S. App. 19a. Indeed, the district court went further, ruling that Texas' claim was not ripe because the issue of whether the elected board was displaced could not be decided without "examining the full factual context in which [the Commissioner] is acting before deciding whether an action can be precleared. Put simply, that discretion makes the statute one that cannot be analyzed uniformly in Section 5 terms." J.S. App. 19a.

The court also held that Texas would not suffer undue hardship if judicial review were withheld. J.S. App. 21a. Seeking preclearance each time the Commissioner places a master or management team is not "so unwieldy as to deny

Texas a meaningful opportunity to expeditiously implement its statutory scheme." J.S. App. 21a. In so holding, the district court ignored the fact that the delay caused by the preclearance process would adversely affect the ability of the Commissioner to rectify the factors causing the deficiency in the school district. Moreover, the district court did not address the damage to federalism that results from requiring a state to seek preclearance when such is not required. To the contrary-the district court simply assumed that voting rights were involved:

> Congress has made the decision that the protection of voting rights outweighs any other state concerns. It is Congress which has struck the balance in favor of preclearance to protect voting interests over school district changes to improve the education process.

J.S. App. 21a.

However, in concluding that Congress "had struck the balance in favor of preclearance to protect voting interests over school district changes to improve the education process", the court did not address Texas' claim that actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"), do not require preclearance.

The Questions Presented Are Substantial

1. Does a three-judge panel of a district court have jurisdiction over a State's claim, under 42 U.S.C. § 1973c, that an amendment to a state statute is not a change covered by § 5 of the Voting Rights Act, and need not be precleared?

This case requires the Court to consider whether Texas has raised a cognizable claim under 42 U.S.C. § 1973c. Texas seeks a determination that § 39.131(a)(7) and (8) are not changes affecting voting, are not subject to the Voting Rights Act, and need not be precleared. The district court did not address whether § 5 allows a state to seek a declaratory judgment that a statute is not covered by § 5. J.S. App. 17a. It noted that

> The statutory basis for jurisdiction over such an action is unclear. Although this Court has addressed issues of section 5 coverage in the past, those claims have arisen in the context of an action for judicial preclearance. [cites omitted] Even if a statutory basis for jurisdiction exists, however, it is unclear whether such an action would involve a "case or controversy" sufficient to satisfy the requirement of Article III of the Constitution.

J.S. App. 17a. This result is incompatible with 42 U.S.C. § 1973c.

The Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in *voting*." *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (emphasis added). States covered by the Act are required to seek preclearance of legislation that is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Because the Voting Rights Act imposes a heavy burden on state sovereignty, however, it is equally clear that states are not required to seek preclearance if the legislation at issue does not affect voting. "Section 5 of the Voting Rights Act is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Presley v. Etowah Co. Comm.*, 502 U.S. 491, 509 (1992).

As the district court noted, actions under § 5 generally have fallen into three main categories. First, a state may bring an action for judicial preclearance. J.S. App. 16a. In that situation, the state shows that the legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c. Second, an individual may bring a private enforcement action, asking for a determination that a proposed change in legislation must be precleared because it is a change affecting voting. J.S. App. 16a. Finally, the Attorney General may bring an enforcement action. J.S. App. 16a; *Allen*, 393 U.S. 544, 561-63. This case asks the Court to consider whether 42 U.S.C. § 1973 permits a state to obtain a judicial determination that an amendment to a state statute is not a change affecting voting, and is not subject to § 5 of the Voting Rights Act. The fundamental tension between the Voting Rights Act and concepts of state sovereignty favor such a cause of action.

Further, the holding in *Allen v. State Board of Education* supports such a holding. In *Allen*, this Court recognized that the importance of federalism issues requires a three-judge panel to determine whether a state statute is covered under § 5 of the Voting Rights Act:

> We conclude that in light of the extraordinary nature of the [Voting Rights] Act in general, and the unique approval requirements of § 5,

> Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.

Allen 393 U.S. at 562-63.

As in *Allen*, the issue before the Court is whether a state enactment is subject to § 5. There is no reason 42 U.S.C. § 1973c should be interpreted to allow both a private individual and the Attorney General to obtain a determination whether a state statute is a change affecting voting, and to deny a state an opportunity to obtain that same judicial determination. In fact, the reasoning of the *Allen* court supports Texas' right to such a determination:

> Notwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration. The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.
>
> In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have

> that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. *There is no less a clash and potential for dispute when the disagreement concerns whether a state enactment is subject to § 5.* The result of both suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.

Allen, at 562-63 (emphasis added). Here, the suit brought by Texas involves the precise federal-state confrontation addressed in *Allen*.

Further, judicial resolution is needed because, in failing to rule on Texas' claim, the district court has allowed the DOJ's determination that a change in a statute is a change affecting voting to go unchallenged. The DOJ's determination that preclearance is necessary is based on its assumption that, under certain circumstances, the placement of a master or management team could result in "the 'takeover' of a school board such that the board cannot perform the function that are its 'reason for being.'" J.S. App. 37a. As discussed above, however, § 39.131(e) of the Texas Education Code contains provisions that specifically preclude either an actual or de facto replacement of the elected board from taking place. The elected board of trustees remains active during the time a master or management team is in effect. The elected board continues its functions, subject to overview by the master or management team. Moreover, the authority of the master or management team is limited by statute, and is not dependent on the Commissioner's discretion. DOJ simply failed to interpret the coverage of section 5 correctly.

This court should not allow DOJ's erroneous determination as to the scope of § 5 of the Voting Rights Act to stand. Moreover, this Court's holding in *Morris v. Gressette*, 432 U.S. 491(1977) does not preclude judicial resolution of this issue. In *Gressette*, this Court held that a district court did not have jurisdiction under the Administrative Procedure Act to review the Attorney General's failure to object to a state's reapportionment plan.

This case differs from *Gressette* in several important respects. First, unlike *Gressette*, this case does not involve a request for preclearance under § 5. The issue here is more basic: that is, whether a state statute is subject to § 5 of the Voting Rights Act, and needs to be precleared. Second, the severe nature of the § 5 remedy supports judicial resolution. Without a judicial determination that the statute is not subject to the Voting Rights Act, Texas will be obliged to submit any temporary placements of a master or management for preclearance. Texas would be denied its right to administrate the education of Texas' children, a matter firmly within the ambit of state regulation.

This case is similar to *Presley v. Etowah County*, 502 U.S. 491 (1992), in which this Court refused to defer to the DOJ's interpretation of the scope of § 5. In *Presley*, the Court considered whether the permanent delegation of authority from an elected to a appointed official constituted a change with respect to voting. The DOJ argued that it did, and urged the Court to defer to the DOJ's administrative construction of § 5. This Court refused to do so. Noting that "[d]eference does not mean acquiescence," *Id.* at 508, this Court emphasized that Congress' intent as to the scope of § 5 is unambiguous: § 5 applies only to changes affecting voting. *Id.* at 509.

In holding that the change in authority of the elected officials in *Presley* did not constitute a change affecting voting, the Court noted that there had been no change in elective office - the citizens still voted for the elected official. Moreover, some changes in duties of elected officials are to be expected: "[i]t is

a routine part of governmental administration for appointive positions to be created or eliminated and for their powers to be altered." *Id.* at 507.

In this case, as in *Presley*, the voters still elect members of the school districts' board of trustees. The board remains in existence, and continues its duties, subject to the limited oversight of the master or management team. However, unlike the situation in *Presley*, where authority was permanently delegated from the elected official to the appointed official, the delegation of authority to a master or management team is limited in authority and limited in time; it lasts only until the deficiencies in the school district have been corrected.

Finally, action taken to protect the education of Texas children is precisely the type of "routine matter[] of state governance" that should not be, and was not contemplated to be, subject to federal supervision:

> By requiring preclearance of changes with respect to voting, Congress did not mean to subject such routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.

Presley v. Etowah County, 502 U.S. at 507.

This Court has expressed concern even more recently about DOJ's expansive interpretation of the Voting Rights Act. In *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the Court refused to accord deference to DOJ's interpretation of the scope of § 5 of the Voting Rights Act, noting that DOJ's "maximization policy requiring States to create majority-minority districts wherever possible," was far removed from "the purpose of § 5." *Id.* at 2493.

In a case decided this term, Justice Thomas emphasized the importance of independent judicial examination of cases under § 5:

> Section 5 [of the Voting Rights Act] sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a provision that covered jurisdictions may obtain preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to preclude judicial preclearance.) Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Reno v. Bossier Parish School Board, 117 S.Ct. 1491, 1504 (1997) (Thomas, J., concurring). While *Bossier Parish* involved a question of whether a redistricting plan should be precleared under § 5, there is an even greater need for independent judicial determination of whether a state enactment is subject to § 5 preclearance at all. A state should not be required to seek preclearance of a specific placement of a monitor or management team before it can obtain a judicial determination that the statute in question is not a change affecting voting. Such a holding would hamper state sovereignty, and violate fundamental tenets of federalism. As in *Miller*, the federalism costs exacted by § 5 preclearance can not be justified under the circumstances of this case. *Miller*, 115 S.Ct. at 2493.

Moreover, the language of the Voting Rights Act, including § 5, makes clear that Congress intended that it apply only to affected states and subdivisions.[3] It does not apply to acts passed by the federal government.

In 1994, Congress passed the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.* This Act revised, strengthened, and improved the Elementary and Secondary Education Act of 1965, and authorized additional funds to help disadvantaged children meet enhanced educational standards. 20 U.S.C. §§ 6301(d), 6302. To be eligible for these funds, States are required to design both challenging performance standards and assessment systems to measure children's achievement under these standards. 20 U.S.C. § 6311 (b).

States receiving funds under this Act must measure students' performance. To assure progress towards educational goals, the Act specifically requires a State to identify any local educational agency[4] that fails to make adequate progress

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[3] Section 1973 of the Voting Rights Act provides in part that:

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be *imposed or applied by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .

42 U.S.C. § 1973 (emphasis added).

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires that an affected state or subdivision seek preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

[4] 20 U.S.C. § 5802(a)(6) provides that the definitions of the terms "local educational agency" and "state educational agency" are found at 20 U.S.C. §§8801(18)(A) and 8801(28), respectively. As defined in § 5802(a)(6), a Texas school district is a "local educational agency," and the

towards meeting the State's student performance standards for two years. 20 U.S.C. § 6317 (d)(3)(A)(i). After a local educational agency has been so identified, the State may take corrective action against that local educational agency. 20 U.S.C. § 6317(d)(6)(A). The State *must* take such action against an identified local educational agency that fails to make adequate progress after four years. *Id.*

Corrective actions range in severity, and may include (1) the withholding of funds; (2) the reconstitution of school district personnel; (3) removal of particular schools from the jurisdiction of the local educational agency and establishment of alternative arrangements for public governance and supervision of such schools; (4) implementation of the opportunity-to-learn standards or strategies developed by such State under the Goals 2000: Educate America Act (20 U.S. C. § 5801 *et seq.)*; (5) *appointment by the State educational agency of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board;* (6) the abolition or restructuring of the local educational agency; (7) the authorizing of students to transfer from a school operated by one local educational agency to a school operated by another local educational agency; and (8) a joint plan between the State and the local educational agency that addresses specific elements of student performance problems and that specifies State and local responsibilities under the plan. 20 U.S.C. § 6317 (d)(6)(B)(i)(I)-(VIII) (emphasis added).

Federal law, therefore, requires States to take corrective action against local educational districts when necessary to assure progress towards educational goals. The corrective actions authorized under federal law are similar to the sanctions authorized by § 39.131(a) of the Texas Education Code. In fact, federal law allows for the *replacement* of a school board,

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Texas Education Agency, headed by the Commissioner of Education, is the "state educational agency" for Texas.

as well as abolition of a school district, both of which are more draconian than the modest sanctions at issue here. 20 U.S.C. § 6317(d)(6)(B)(i)(V), (VI). If a school district fails to make adequate progress towards meeting the State's educational performance standards, both the Texas and federal statutes provide for the appointment of a receiver or trustee to administer the affairs of a school district.

Further, Congress has recently passed legislation which enables states to substitute their own assessment and accountability provisions for those of the federal statutes. In 1994, Congress passed the Educational Flexibility Partnership Demonstration Act ("Ed-Flex") as part of the Goals 2000: Educating America Act ("Goals 2000"), 20 U.S.C. § 5801 *et seq*. The Goals 2000 Act is intended to promote educational reform leading to improved educational outcomes by, among other things, "encouraging and enabling all State educational agencies and local educational agencies to develop comprehensive improvement plans. . ." 20 U.S.C. § 5801(6)(D).

In the Goals 2000 Act, "Congress agrees and reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States. . ." 20 U.S.C. § 5899(b). Moreover, the Act expressly provides that the federal government shall take no action under the Act "which would reduce, modify, or undercut State and local responsibility for control of education." *Id.*

This emphasis on state control of education is further demonstrated by the Ed-Flex portion of the Act. 20 U.S.C. § 5891. Ed-Flex provides that the Secretary of Education may authorize State educational agencies in eligible States to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2). One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes the corrective actions discussed above. 20 U.S.C. § 5891(b)(1).

Texas has been selected as one of seven Ed-Flex Partnership states, allowing it to waive certain provisions of federal law, including the corrective actions listed in Title I of the Elementary and Secondary Education Act of 1965, found at 20 U.S.C. § 6317(d)(6)(B)(i)(I)-(VIII). *See* Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996), J.S. App. 39a-48a.

Texas has used the Ed-Flex waiver process to conform the federal grant of authority for corrective actions to the provisions of its state authorization under Chapter 39 of the Texas Education Code. Thus, Texas has *pursuant to federal authorization* precisely the same authority it enjoys under state law.

Because a federal statute authorizes Texas to use its own accountability program, section 5 of the Voting Rights Act does not apply to § 39.131(a)(7) and (a)(8) of the Texas Education Code which conform to that federal statute. To hold otherwise would imply that a change in state law that conforms to, and is specifically permitted by, a federal statute is a change affecting voting subject to § 5 preclearance requiring Texas to show that by following federal law the legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race". 42 U.S.C. § 1973c. This result is a classic "reductio ad absurdum". Yet that is the result of the district court's ruling. Such a result prevents Texas from exercising its power in a responsible manner within the federal system, and defeats the purpose of the federal education statutes. Requiring Texas, unlike states not covered by section 5 of the Voting Rights Act, to seek preclearance in this circumstance could result in the very harm to education that the federal statutes are intended to prevent. In fact, § 5, if applied in this circumstance, would punish covered jurisdictions in a manner that Congress never intended.

2. Is a state's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has taken no action under the "enabling" legislation?

The district court dismissed Texas' claim on the grounds that it did not meet either the constitutional or prudential requirements of ripeness. The district court erred in that determination.

Ripeness is governed by a two-part test. First, the Court must consider the "fitness of the issue for judicial decision." Second, the court must consider "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Consideration of both factors indicate that this case is ripe.

A. Fitness of issue for judicial determination.

In considering whether an issue is fit for judicial decision, the court must consider whether there is a present case or controversy between the parties. There is. Texas has enacted legislation and seeks a determination that this legislation need not be precleared because it is not subject to § 5 of the Voting Rights Act. Texas asks this Court to construe a statute. Questions of statutory interpretation are independent of any factual dispute. In *Abbott Laboratories v. Gardner*, this Court held that whether the Food and Drug Commissioner had correctly interpreted a statute was fit for judicial determination because the "issue tendered is a purely legal one." 387 U.S. at 149.

Moreover, the impact of the DOJ's decision that the particular placement of a master or a management team must be precleared "is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage" because the

decision "put [the State of Texas] in a dilemna." *Abbott Laboratories v. Gardner*, 387 U.S. at 152. Either the State complies with the preclearance requirement and subjects routine matters of state government to federal supervision, or it follows its present course and risks time consuming litigation that will encumber the State's ability to address problem school districts. *Id.*

Nor must the Court wait until Texas makes a specific placement of a master or management team to determine the authority given the master or management team. As discussed above, the limitations on a master's or management team's authority are codified at TEX. EDUC. CODE § 39.131(e). No factual determinations are necessary for a court to decide whether the appointment of a master or management team exercising the limited powers authorized by the statute constitutes a change affecting voting. In short, a court can render a declaratory judgment based on its purely legal assessment that § 39.131(a)(7) and (8) are not provisions containing changes affecting voting subject to § 5 of theVoting Rights Act.

Further, as explained more fully above, Texas' claims under the Improving America's Schools Act, 20 U.S.C. § 6301, *et seq.*, as modified by the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5801 *et seq.*, are purely legal ones, and not dependent on facts. That issue is whether the Voting Rights Act applies to state action taken pursuant to a federal statute.

B. Hardship to the parties

The immediate impact on Texas satisfies the "hardship" prong of the *Abbott Laboratories* test, because "the legal issue presented is fit for judicial resolution, and ... requires an immediate and significant change in [Texas'] conduct of [its] affairs with serious penalties attached to noncompliance." 378 U.S. at 153.

Failure to consider Texas' claims now causes more hardship than "expedited" litigation in the future. Failure to rule on Texas' claims subjects Texas to unwarranted federal intrusion into state affairs. This result violates the Constitutional guarantees of federalism. Texas has enacted Chapter 39 of the Texas Education Code to fulfill its important responsibility to educate the children of the State. The sanctions provided in § 39.131(a), including the temporary placement of a master or management team with their limited powers, are intended to provide Texas with the controls necessary to meet that responsibility. Legislative changes to these controls are quintessentially "changes in the routine organization and functioning of government" that this Court described and distinguished from "changes in rules governing voting" in *Presley v. Etowah County*, 502 U.S. at 504-508. Refusing to hear Texas' claims until Texas takes action and then seeks preclearance under the enabling legislation, turns the fundamental precept of federalism on its head.

Moreover, Congress recognizes that "the responsibility for control of education is reserved to the States ..." 20 U.S.C. § 5899(b). Thus, Congress specifically permits States to substitute their state education accountability provisions for federal education accountability provisions to ensure state governance over education. It makes no sense to permit Texas to appoint a trustee under federal law without seeking preclearance, but to require Texas to seek preclearance when it does so under state law, as expressly authorized by federal statute.

CONCLUSION

DOJ's over-expansive application of § 5 of the Voting Rights Act interferes with, and disrupts Texas' system to maintain the quality of education in the State. The district court's opinion, if upheld, will have a predictable result: the

diminution of the quality of education of all Texas school children. The Court should note probable jurisdiction.

Respectfully submitted,

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